

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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KEVIN FERNANDEZ,

Plaintiff,

v.

BRUCE BANNISTER, et al.,

Defendant.

Case No. 3:13-cv-00412-MMD-VPC

ORDER

This is a closed prisoner civil rights action brought pursuant to 42 U.S.C. § 1983. On December 23, 2013, the Court granted Plaintiff's application to proceed *in forma pauperis* but dismissed this action for failure to state a claim for which relief may be granted. (Dkt. no. 3.) Judgment was entered the same day. (Dkt. no. 5.) Plaintiff filed a notice of appeal on January 2, 2014. (Dkt. no. 6.)

On January 7, 2014, the Ninth Circuit referred this matter to the District Court for the limited purpose of determining whether Plaintiff's *in forma pauperis* status should continue on appeal or whether the appeal is frivolous or taken in bad faith. (Dkt. no. 8.) 28 U.S.C. § 1915(a)(3) provides that "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." "In the absence of some evident improper motive, the applicant's 'good faith' is established by presentation of any issue that is not plainly frivolous." *Ellis v. United States*, 356 U.S. 674, 674 (1958). The standard for determining whether an appeal is frivolous is essentially the same as the standard for determining whether a claim is frivolous, *i.e.*, whether it lacks


1 an arguable basis either in law or in fact. See *Franklin v. Murphy*, 745 F.2d 1221, 1227–
2 28 (9th Cir. 1984); see also 28 U.S.C. § 1915(e)(2) (stating that suit must be dismissed
3 if it is frivolous, fails to state a claim, or is brought against defendants immune from suit
4 for monetary damages).

5 The Court dismissed this action for failure to state a claim upon which relief could
6 be granted because the claims asserted are the same as the issues raised in another
7 case, which is also pending before the Ninth Circuit Court of Appeals. (Dkt. no. 3.) The
8 Court therefore concludes that Plaintiff's appeal lacks an arguable basis in law and is
9 frivolous.

10 This Court certifies that any *in forma pauperis* appeal from its order dated
11 December 23, 2013 (dkt. no. 3), would not be taken "in good faith" pursuant to 28
12 U.S.C. § 1915(a)(3).

13 It is further ordered that the Clerk of Court shall send this order to the United
14 States Court of Appeals for the Ninth Circuit.

15 DATED THIS 16th day of January 2014.

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19 MIRANDA M. DU
20 UNITED STATES DISTRICT JUDGE
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